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JAN 17 1970

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 79-51

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES
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REPLY BRIEF FOR PETITIONER

A R G U M E N T

The Petitioner Contends That the Police Search and Seizure of the Petitioner's Diary Was Illegal Prior to Chimel.

The respondent argues that because there was a pistol on a coffee table in the apartment and Miller told the officers that he had not seen any guns in the apartment, that this suspicious conduct reinforced the officers' belief that the man was Petitioner attempting to evade arrest and search.

There is nothing in the record that gives any indication whatsoever either by circumstantial evidence or by testi-

mony, that Miller was attempting to evade arrest and search. Miller himself was not armed and Miller was arrested immediately after answering the door. Miller made no overt acts to evade arrest from the four arresting officers. By the number of officers present and by the weapons they displayed, including two shotguns, this would seem to preclude any attempt by Miller to evade arrest and search.

Respondent further contends that Miller aroused further suspicion by indicating his total ignorance as to Petitioner's whereabouts, stating that no one else was present and that he was just sitting around waiting for Hill. The respondent argues further that, although the door to the apartment had a lock, Miller was unable to give any satisfactory explanation for his presence.

The Petitioner is uncertain what is required for a "satisfactory" explanation. Miller told the officers he was not Hill and confirmed this fact by showing the officers personal identification that he was Miller and that he just came into the apartment and was waiting for Hill to come back. Miller told the officers he did not live in the apartment and he did not know where Hill was.

The fact that there was a lock on the door is not so unusual, there is nothing in the record to reflect any evidence that the door was locked prior to Miller entering the apartment. Miller was a visitor in the Petitioner's apartment and the fact that he didn't see the pistol on the coffee table doesn't appear to be an unusual circumstance. The police are trained to observe these sorts of things, while a visitor to someone's apartment could easily overlook an object of this sort.

The respondent points out that the only disparity between the appearance of Miller and Petitioner was that Petitioner was two inches shorter at five foot ten inches, and ten pounds lighter, and then cites *Draper v. United States*, 358 U.S. 307 as his first authority.

In the case at bar, we are dealing with a very general description of identification by a lay person of what the Petitioner looked like. The arresting officer testified at the trial regarding other areas of similarities between Petitioner and Miller; the answers given by the officer were either ambiguous or the officer couldn't recall. [Appendix 62]

In the *Draper* case, the agents had a very detailed physical description of Draper and of the clothing he was wearing and also were informed that he would be carrying a tan zipper bag and that he habitually walked real fast.

All of the aforesaid information was observed by the agent at the train station, along with information received showing where Draper would be. Furthermore, the agent and a Denver police officer kept watch over all incoming trains from Chicago and did not see anyone fitting the description of Draper until the second day of their search. More important, when the officer made the arrest pursuant to their information, they arrested the proper man.

The respondent argues the possibility that Bader's authority is sufficient to search Petitioner's apartment on the basis that Bader told the officer he "could go" to Petitioner's apartment. First of all, telling an officer he can go to Petitioner's apartment is a far different thing from consenting to a long and detailed search of the apartment. Secondly, Bader was being held in custody by the police

and he doesn't have the right to strip the Petitioner of his personal constitutional guarantees.

In *Tompkins v. Superior Court* (1963), 59 C 2d 65, 378 P 2d 113, police officers lawfully arrested N in his car in possession of marijuana. He was asked about other narcotics in his apartment, denied that there were any, and gave the officers his keys to confirm this fact. The officers, acting under this consent and without a warrant, called at the apartment, where petitioner refused them admittance. They broke in, finding marijuana.

The Court held the search was *illegal*. There was no basis for a good faith belief that N had authority to consent to the search. Under the law of real property, one co-tenant cannot lawfully do anything to the prejudice of the others, and a joint occupant's right of privacy is not completely at the mercy of the other occupant.

The personal diary that was seized in this case was in no way connected with the crime. The Courts in the past, for the most part, have distinguished this type of evidence from evidence connected with the crime. Congress has never authorized the issuance of search warrants for the seizure of mere evidence of crime. *Davis v. U. S.*, 328 U.S. 582.

In *Warden v. Hayden*, 387 U.S. 294, it was noted that the articles of clothing admitted into evidence were not within any of the traditional categories which describe what materials may be seized either with or without a warrant. In the *Hayden* case, the clothes found in the washing machine matched the description of those worn by the robber and the police could therefore reasonably believe that the items would aid in the identification of the robber.

The Court in *Hayden* by the majority opinion, went on to state, "But if its rejection (mere evidence rule) does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularly requirements of the Fourth Amendment and after the intervention of a neutral and detached magistrate".

The Court also stated, "in the case of mere evidence, probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." It is the Petitioner's contention that the diary seized by the police is clearly distinguishable from the other items seized.

Even assuming the mistaken arrest of Miller was valid, this would not authorize the police to make anything but an incidental search to the arrest, not an exploratory search for every conceivable personal belonging of Petitioner, as was made in the case at bar.

It appears in reading past case opinions by this Court regarding Fourth Amendment principles that this Court has never gone to the point that once they allow the police to search a person's home by constitutionally accepted exceptions that this gives the police an open end invitation to search and seize wherever and whatever they choose to do, totally disregarding a citizen's privacy as to items completely unrelated to the reasons for the search or evidence of other crimes.

The Court stated in *Abel v. United States*, 362 U.S. 217 that, "We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers

desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled v. United States*, 255 U.S. 298, 310, nor may the Government seize, wholesale, the contents of a house it might have searched, *Kremen v. United States*, 353 U.S. 346."

The Petitioner contends there is a sharp distinction between the search and seizure of the Petitioner's personal diary from his bedroom drawer and the other items seized by the police that had some relationship to the cause of the search. It would seem not to distinguish between the diary which had absolutely no connection with the crime and the other items seized by the police that did, would have eroded the Fourth Amendment to a point where it afforded very little protection from the police in the invasion of a citizen's privacy.

Chimel Should Be Given a Limited Retroactive Effect at Least to Those Cases on Direct Appeal.

The respondent argues the cases to suggest *Chimel* should not be given retroactive effect, on the basis that the exclusion of illegal evidence by the Courts has been based on the necessity for an effective deterrent to illegal police action. The respondent goes on to state in effect that since the misconduct of the police has already occurred, it would be impossible to curb the past misconduct of the police by having the evidence excluded in this case.

It is just this type of reasoning that the police rely on to illegally invade the privacy of citizens in their home. The police are well aware that the machinery of the Court takes considerable time (such as three and a half years in

this case) before their overzealousness to obtain evidence and a conviction will be curtailed by the Courts.

In the meantime, the police know that any encroachments they make upon the Fourth Amendment will certainly invade the privacy of many private citizens, but also knowing they will also get more illegally obtained evidence against criminals.

The Fourth Amendment, declaring that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", forbids every search that is unreasonable, and protects those suspected or known to be offenders as well as the innocent. *Go-Bart v. U. S.*, 282 U.S. 344-358.

The respondent also quotes a newspaper article in the Los Angeles Times wherein the District Attorney of Los Angeles County, a populous county with over 7,000,000 persons, estimated that "as many as 90% of the cases scheduled for trial could be affected in some way by the *Chimel* case", further adding that the ruling in *Chimel* if made retroactive, could cause a massive log jam in the trial courts.

The *Chimel* decision when it was first announced, made headlines on the front pages of many newspapers including the Los Angeles Times. The District Attorney of Los Angeles County was severely criticized by many because of the aforesaid statements directed to the general public which implied that 90% of the defendants scheduled for trial might go free as a result of this decision.

Nothing was further from the truth. In fact, the District Attorney, on television news interviews after this article

was printed, admitted that in the overwhelming majority of the cases pending at that time, there would be very little impact. The District Attorney went on to explain that just a relatively few cases would seriously be affected by the decision since in most cases the other evidence that was legally obtained would be sufficient to obtain a conviction.

For substantially the same reasons, the Petitioner contends it is reasonable to believe just a small percentage of cases would be reversed on basis of *prejudicial* error above those relatively few cases that would be reversed on the grounds the illegally obtained evidence was the only evidence obtained.

Granted, some new trials would be required, if *Chimel* is given even limited retroactive effect (such as to apply to those cases on direct appeal), and some defendants would be set free altogether. However, it would seem to take a real pessimist to speculate that the judiciary machinery would come to a grinding halt because *Chimel* was given partial retroactive effect.

If you take the other side of the coin, you would never hear that the judicial processes should be avoided or cases dismissed merely because there is a sudden dramatic increase in the number of criminal cases that have to be prosecuted. The judicial machinery should be and, in fact, is extremely flexible even in large counties.

For example, the Courts in Los Angeles County were commended highly for their efficient and orderly manner in which they handled the hundreds and hundreds of defendants arrested during the course of the Watts riot in 1965.

The defendants involved in this infamous riot were afforded constitutional fair trials, without unreasonable de-

lay, and without materially affecting the normal criminal calendar. Certainly by citing the aforesaid example, it is not suggested here, that by making *Chimel* partially retroactive, it will have the practical effect of creating a sudden dramatic increase in the courts' work-load, but this example is merely used to point out and illustrate that the courts generally would be equipped to handle those cases that do require re-trial.

In conclusion, the Petitioner respectfully submits again that *Chimel* is no sudden departure from *Rabinowitz* and *Harris*, and as the respondent quoting *Chimel* pointed out, this Court has relied upon "Rabinowitz and Harris less and less in our own decisions".

As a practical matter, the Grand Jury of Los Angeles County has been investigating police practices in this exact area in question during 1969, and members of the Grand Jury have already stated they are extremely concerned with inconsistent police procedure in search and seizure cases. Police procedure in Los Angeles came to the attention of the general public in a dramatic way when four law enforcement men, two armed with shotguns, left a local bar after a couple of drinks, entered an apartment to search for narcotics, and while causing quite a ruckus, accidentally shot and killed a completely innocent twenty-one year old man in a different apartment, and inflicted injury to his baby that he was holding.

By making *Chimel* partially retroactive to cases on direct appeal, it will have the practical effect of allowing the police sufficient means to accomplish their difficult job and still provide the continuous protection the Fourth Amendment was intended to provide by the makers.

For the above stated reasons, the Petitioner respectfully requests that the illegally obtained evidence, in particular the personal diary of the Petitioner, be excluded from evidence and the conviction of the Petitioner be reversed.

Respectfully submitted,

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No. 51

Supplement to respondent's
brief filed on Jan 17, 1970
(not printed)